IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14919

LOUIS E. WOLCHER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING

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TO THE HONORABLE WILLIAM HEALY, WILLIAM ORR AND WALTER L. POPE, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Comes now Louis E. Wolcher, appellant herein, and files this petition for rehearing of the order and opinion of this Honorable Court, dated May 15, 1956, affirming the order of the District Judge denying the motion for new trial on the ground of newly discovered evidence.

I. THE COURT COMMITTED SUBSTANTIAL ERROR INSOFAR AS IT AFFIRMED ON THE SUPPOSITION THAT A NEW TRIAL WOULD RESULT IN A GUILTY VERDICT.

A. IN SPECULATING AS TO THE BASIS ON WHICH A JURY MIGHT CONVICT, THE COURT'S OPINION REFLECTS A SERIOUS MISUNDERSTANDING AS TO THE FACTS AND IS UNJUST TO APPELLANT.

It is the unavoidable duty of counsel for appellant to bring to the attention of this Court that its opinion is inaccurate and unjust to appellant insofar as it sets forth

a supposition that a new trial would not produce a different result.

Whether or not the Court reconsiders or adheres to its views of the applicable rules of evidence (point II below) counsel respectfully submits that this Court should at least eliminate the last four paragraphs of its opinion.

This Court should not wish to deny or prejudice the right of appellant to present to the Supreme Court the legal questions of the appropriate rules of the admissibility of evidence which Mr. Justice Douglas indicated "go to the heart of the case."

(1) This Court misunderstood the defense to rest on the claim that there was no profit whatever from black market activities. The defense was not that there was no profit but rather that the profit was at the tavern (retail) level and not the wholesale level. The tavern income was fully reported and there is not even a suggestion to the contrary.

The Court's opinion sets forth that appellant's defense "was simply that *he made no profits.*" (Emphasis in original.) In the next to the last paragraph, the Court says that the "story" that appellant ran the risk of fine and imprisonment without any gain is "implausible," nowithstanding appellant's assertion that he did so in order to obtain liquor for his own taverns.

The Court misunderstood the basis of appellant's defense. As is pointed out in appellant's closing brief (pp. 17-18) appellant did not say there were no profits, but rather expressly testified that the profit was not from sale of liquor *by the case,* at wholesale, but was rather realized at the retail (tavern) level:

> "A. Well, I did make a profit. I did make a profit. I made a profit from the sale of this liquor through the taverns which I owned, and those members of my family made a profit and were able to make some money and to repay the loans that it had taken to start these businesses. *So there was a profit made,*

but not from the sale of liquor by the case as such.'' (R. 14109, pp. 409-410.) (Emphasis supplied.)

Appellant's assertion is not merely that his black market activities enabled him to obtain whiskey for the Wolcher taverns, i.e., the taverns owned by appellant and members of his family. Appellant's assertion is specifically that his black market activities enabled him to sell large quantities to the Wolcher taverns *at ceiling.*

Appellant's defense is not that there was no profit, but rather that the gain was realized at the retail (tavern) level, not at the wholesale level. If appellant had obtained only the 3,764 cases of whiskey which were resold in the black market, as itemized in the Government's appendix, he would clearly have made a wholesale profit, since his black market overages on those cases were concededly greater than the payments he testified making to Gersh. But appellant purchased 5,138 cases of whiskey and only 200 cases remained unsold at the end of the taxable year. (Govt. Brief, p. 3.) Since all 5,138 cases were purchased in the black market, the absorption of large black market overages on the whiskey that was purchased above ceiling but resold at ceiling meant that appellant's operations were equalized at the wholesale level.

The Wolcher taverns concededly made substantial profits as a result of appellant's black market activities. As noted in Appellant's Closing Brief, p. 18, instead of having to pay black market prices the Wolcher taverns were able to purchase from appellant full supplies of case whiskey at ceiling prices. Their purchases at ceiling prices rather than black market prices was worth over $17,500 as a conservative estimate, even assuming purchases at the black market overages paid by appellant. The saving is even greater if the ceiling price is compared with the $60 black market prices paid by other San Francisco taverns. But there has not even been a suggestion, and there could be none, of understatement of income in the returns filed for these taverns.

(2) In stating that the new evidence would corroborate appellant only as to a portion of these black market receipts,—

(a) *This Court erroneously doubled appellant's black market receipts by mistakenly including therein the amounts of the checks to the San Francisco wholesalers making the deliveries;*

The Court refers to appellant as "illegally receiving some $200,000" in black market money. That is incorrect.

That figure results from jumbling together the black market cash payments which the tavern owners (of the taverns other than the Wolcher taverns) paid to appellant with the payments made by check by those tavern owners to the San Francisco wholesalers delivering the whiskey.

As this Court noted in an earlier opinion, the full ceiling price was covered by check payable to the San Francisco wholesaler, and only the amount over ceiling was paid, in cash, to appellant. *Wolcher* v. *United States,* 200 F. 2d 493, 495 (9th Cir.)

Mr. Schnacke's trial summation (part of the record on this appeal, see R. 5, 66) added up all the overceiling cash payments that the Government established to have come to appellant. (P. 3 et seq. of Mr. Schnacke's opening argument, August 31, 1953.) This came to $88,853.71 cash receipts to appellant on the Eastern whiskey, and only $6,150.00 on the West Coast whiskey. (Itemized, p. 5 of the Appellant's Opening Brief.)

And these cash receipts by appellant of approximately $90,000 of course do not take into account any overceiling payments made by appellant to obtain the whiskey.

(b) *This Court erroneously ignored the substantial amounts documented at the first trial as payments by appellant to Gersh, and failed to consider the significance of the newly discovered evidence in the light of this background. All this evidence taken together corroborates payments to Gersh accounting for the overwhelming bulk of appellant's black market receipts.*

In the next to the last paragraph of its opinion the Court says that the proposed new evidence would at most corroborate appellant's story as to a disposition of a portion of the black market money received, leaving a large amount unaccounted for except by appellant's testimony.

This Court erred in failing to take into account the evidence at the first trial. At the first trial Gersh acknowledged handling $85,000 received from appellant Wolcher. See *Wolcher* v. *United States,* 200 F. 2d 493, at page 495:

> "Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance of the full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5250, but that he had returned all the balance of the $85,000 to Wolcher."

In that case this Court held that the trial court had erroneously excluded evidence offered by Wolcher to rebut Gersh's testimony that coin machines required cash payment in advance. This court stated: (200 F. 2d at p. 499):

> "We think this evidence was material. It would have had weight in determining the question whether

> Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher. It should have been admitted."

This Court has already recognized the significance of evidence impeaching Gersh's explanation of coin machines. Obviously the newly discovered evidence is far more significant since it goes beyond demolishing Gersh's explanation and affirmatively corroborates appellant's account of whiskey black market payments.

The record of the first trial (No. 12992) is of course in the file of this Court. The relevant portions of Gersh's testimony in the first trial (No. 12992) appear in the appendix to the petition for certiorari, filed in the Supreme Court on May 13, 1955, which was incorporated into the record of this proceeding (R. 14919, pp. 5, 67-68).

Gersh's testimony as to receipts of checks and cash from Wolcher was confined solely to the items which he could not deny receiving, because they appeared in his bank records which were in evidence and in the courtroom at the first trial. At the second trial the jury did not even have before it this evidence as to Gersh's receipts from Wolcher.

Appellant is not being treated justly if the newly discovered evidence alone is appraised without taking into account the previously available evidence adduced at the first trial. Although appellant cannot here complain of the rulings making unavailable to the second jury the evidence adduced at the first trial,[1] he is entitled to have

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[1] Defense counsel was prevented from questioning the revenue agent in charge concerning the payments by Wolcher to Gersh that had been documented at the first trial. This time the Government released Gersh from subpena, without notice to defense counsel, and did not call him in rebuttal. The case was submitted. In the midday recess before arguments to the jury, defense counsel learned that Gersh was nevertheless in fact in San Francisco, and he promptly asked to reopen the trial so that he might summon Gersh to identify his bank records. The trial court denied leave, and this Court affirmed on the ground that such a ruling was a matter of discretion for the trial judge. *Wolcher* v. *United States*, 218 F.2d 505.

the previously available evidence and the newly discovered evidence, which are interrelated, considered as one in this motion. Although considered separately each may be unavailing, taken together they provide requisite corroboration of appellant's defense in two vital respects in which Wolcher and Gersh differed. The newly discovered evidence should not be considered in isolation; it should be considered in the light of the totality of the evidence which appellant will present at a new trial.

1. Purpose. Gersh's admission in the first trial of receipts of cash and checks from appellant did not support appellant's testimony as to the *purpose* for which the money was sent to Gersh. Now appellant's otherwise unsupported testimony of payments to Gersh for whiskey black market purchases—an activity Gersh completely denied—is corroborated by Corriston's newly discovered testimony.

2. *Amounts.* But Corriston's evidence does more than corroborate Wolcher on the purpose of the amounts admittedly received by Gersh. It corroborates Wolcher in another important respect, namely, Wolcher's testimony, which Gersh disputed, as to the *amount* Gersh received from Wolcher.

At the first trial Gersh's bank account established, and Gersh was forced to admit, receipts of large amounts which Wolcher testified he sent to Gersh. The following table shows the extent to which Gersh corroborated receipts from Wolcher.

Wolcher Testimony of Payments to Gersh (References to Record No. 14109)	Gersh Corroboration (References to Record No. 12992; References to Appendix C, Refer to Appellant's Petition for Certiorari, No. 77, October Term, 1955)
$ 5,000 by check in June[2] 1943 (R. 358, 363)	R. 12992, pp. 559, 585 Appx. C, pp. 20a, 27a
3,300 cash by mail, Aug. 1943 (R. 359)	R. 12992, p. 586 Appx. C, p. 28a
5,000 cash by mail, Aug. 1943 (R. 461)	R. 12992, p. 587 Appx. C, pp. 28a, 29a
12,500 cashier's check bought for cash, Sept. 1943 (R. 378-9)	R. 12992, p. 587-8 Appx. C, p. 29a
60,000 personally delivered Nov. 1943:[3] $30,000 by draft; $30,000 in cash (R. 360-1, 371-2)	Gersh claimed he handled the $30,000 bank draft only to cash same for Wolcher. He denied receipt of the $30,000. R. 12992, pp. 560-563, Appx. C, pp. 20a-22a, 29a-32a
30,000 cash by express, Jan. 1944 (R. 362)	R. 12992, p. 592-3, Appx. C, pp. 32a-33a

[2] NOTE: Appellant testified that he and Gersh arranged for payment for the two instances in June and September when appellant used checks in a way that was traceable to appellant's books. R. 14109, pp. 364, 380; 403-5. Accordingly $35,000 was repaid to appellant—partly through Gersh purchase of coin equipment. R. 12992, pp. 560-562, Appx. C. pp. 20a-22a.

[3] Ibid.

At the first trial the great clash between Wolcher and Gersh concerning amounts, arose with respect to Wolcher's testimony that he personally delivered $60,000 to Gersh in November 1943—$30,000 in cash, and $30,000 in a bank draft. (R. 14109, pp. 360-361; Dft. Exh. F, pp. 371-2). Gersh testified that he only handled the $30,000 draft for the purpose of cashing the check for appellant.[4] Gersh

[4] R. 12992, pp. 560-563, 588-592, Appx. C, pp. 20a-22a, 29a-32a.

denied either having retained the $30,000 of the bank draft or having received the $30,000 in cash. Corriston's testimony clearly corroborates Wolcher on this receipt of $60,000 by Gersh for whiskey black market purchases. For only Wolcher's testimony—and not Gersh's—could account for Gersh's ability to arrange for the $50,000 overage.

At the meeting attended by Corriston in November or December 1943, Gersh not only paid a $10,000 deposit, but also stated his intention to pay the balance of the necessary $50,000 out of cash on hand.

Wolcher is therefore corroborated as to payments to Gersh of $80,800 in cash, and a cashier's check purchased with cash. (This is in addition to the corroboration of his payments of $35,000 to Gersh by check traceable to his books, which amounts Gersh returned to him to cancel book entries.)

That figure of $80,800 accounts for more than 90 percent of the amount ($88,853.71) that Mr. Schnacke established as appellant's overceiling receipts on the resale of the Eastern whiskey. (See point (a), above, p. 4.)

(3) Moreover, it was unjust and unwarranted for this Court to depart from the basis on which the case for conviction was submitted to the jury—that appellant's testimony of sending cash to the East for black market payments was a fabrication—and to speculate that, even with corroboration of appellant's testimony on this basic point, the jury might find appellant guilty on a different hypothesis.

The case for conviction was submitted to the jury on the basis that appellant's testimony that he sent large amounts of money to Gersh for black market whiskey payments was a fabrication.

The District Judge charged (R. 14109, pp. 482-3):

> "Now I think it might be well if I very briefly stated to you what the Court believes is the issue of the case as it appears from the contentions respect-

ively of the parties—the Government on the one hand and the defendant on the other hand. The Government contends, as appears from the argument made by Government counsel, that the cash monies that the Government proved the defendant received from the sale of liquor and which the defendant admitted that he received, were income and were net income, and that the whisky was purchased for the purpose of making a profit on it in its resale and not for the benefit of the defendant's own taverns, or his friends'. The Government contends that there were no records of the transaction kept by the defendant, and that that was so that he could keep the proceeds without paying any tax on them. The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."

The prosecuting attorney put it this way in his summation:

1. Appellant showed a net transfer to Gersh of $12,500 by check. But Gersh was in the coin machine business, and handled coin machine transactions for appellant. There is no evidence whatever other than appellant's testimony, not a word in correspondence or books, to connect Gersh with the alleged black market whisky purchases. (R. 14919, pp. 7-8, par. (c).)

2. There is only appellant's unsupported word for this fantastic story of cash shipments to Gersh, by mail or express, without any record or receipt. If any such amounts of cash were sent, would they be sent in this fantastic fashion? (R. 14919, p. 7, par. (b).)

As already noted, the second jury was not even aware of the fact that Gersh's documentary bank deposit records showed, and that Gersh accordingly admitted, that appellant sent him $3,300 cash by mail (deposit entry August

11, 1943); $5,000 cash by mail (deposit entry August 31, 1943); and $30,000 cash by express (deposit entry, January 4, 1944). Gersh had admitted this to the revenue agents, and in his testimony reviewing his bank records as prosecution rebuttal witness at the first trial.

In view of the basis on which appellant's conviction was obtained, it is unjust and unwarranted for this Court to speculate that with the new evidence corroborating appellant, a jury would convict on a different theory.

The salient corroboration of appellant's testimony in the newly discovered evidence inevitably supports appellant's testimony viewed as a whole. It comports neither with fairness nor experience to speculate that a conviction obtained on the basis that appellant's defense, resting solely on defendant's uncorroborated testimony, was a fabrication out of whole cloth, would persist in the face of the total corroboration of appellant's testimony. Appellant's testimony would be corroborated both (a) as to the purpose of his payments to Gersh, the important link previously missing, and (b) as to the amounts he paid to Gersh, for the $60,000 delivery previously denied Gersh is now corroborated by Corriston. Taken together with the amounts admitted by Gersh at the first trial, the corroboration relates to the vast bulk of appellant's black market receipts.

As for the previous verdicts, at the first trial the Government produced Gersh in rebuttal but the material evidence impeaching Gersh's coin machine explanation was excluded. At the second trial, the jury recommended leniency without even being aware of the bank records establishing Gersh's receipt of substantial sums of cash. Appellant's testimony that he made black market whiskey payments, primarily in cash and largely through the mail, to a certain Mr. Gersh, a man otherwise identified merely as a man in the coin machine industry, was peculiarly vulnerable to the prosecution charge that it was a pure fabrication.

There is no warrant for concluding that a guilty verdict would be rendered by a jury considering all the evidence which would be available on a new trial. As Justice Douglas said, the newly discovered evidence is "probative of a crucial fact issue" and "might well tip the scales in defendant's favor, as it goes to the heart of the case." (Opinion, Dec. 31, 1955; Opening Brief, p. 32.)

(4) The Court misunderstood the significance of and extent to which the defense made by appellant now stands corroborated.

Appellant paid taxes on $66,000 income. The indictment charged evasion of taxes on an additional $30,000 income. The prosecutor claimed proof of approximately $90,000 additional income. The great bulk of the whiskey involved was Eastern whiskey, and appellant testified as to payments made to Gersh to obtain that whiskey in the black market. Appellant's defense of payments to Gersh to obtain the whiskey in the black market was totally uncorroborated. As the prosecutor pointed out, there was nothing other than appellant's unsupported testimony to connect Gersh with whiskey black market purchasing or to show that appellant sent him cash for this purpose. Now Corriston's newly discovered evidence provides the corroboration that was previously missing as to the purpose of appellant's payments to Gersh, and strongly corroborates Wolcher, as opposed to Gersh, concerning amounts over and above those admittedly received by Gersh.

Appellant's testimony shows that his black market activities resulted in a *retail* gain of at least $17,500 for the Wolcher taverns, but there was no contention that income for those taverns was understated. This Court appears to have misunderstood the extent to which Corriston's testimony corroborates appellant's. It erroneously doubled the amount of appellant's black market receipts, and did not consider both the new and the old evidence concerning payments. A reconsideration of the full record should, we believe, lead this Court to modify and

strike as unwarranted its conclusion that a new trial would lead to the same result.

B. THE COURT'S AFFIRMANCE WOULD ERRONEOUSLY PLACE ON APPELLANT THE BURDEN OF PROVING INNOCENCE.

It is respectfully submitted that if after reconsideration of the factual record this Court adheres to its conclusion that no different result would be reached at a new trial, it will in effect, and erroneously, be placing upon defendant the burden of showing his innocence.

On a motion for new trial defendant should not be required to establish his innocence. He must merely show a likelihood that the new trial will result in acquittal. That standard requires that on a new trial he will adduce evidence likely to create a reasonable doubt of guilt. In Judge Chesnut's phrase, the governing requirement is that the evidence be "substantial in the perspective of the case as a whole." *United States* v. *Frankfeld,* 111 F. Supp. 919, 923 (D. Md. 1953). The effective standard is reflected by Justice Douglas' opinion of December 31, 1955, which notes that Corriston's evidence, if admissible, is "probative of a crucial fact issue in the case" and "might well tip the scales in defendant's favor, as it goes to the heart of the case."

If this Court adheres to its conclusion that the new evidence will not result in acquittal, it will obviously not be ruling that the evidence is not substantial. It will rather be indicating a disinclination to grant a new trial unless appellant affirmatively establishes his innocence. Such a standard is improper and unwarranted.

C. THIS COURT EXCEEDED ITS PROPER FUNCTION AS AN APPELLATE COURT WHEN IT PURPORTED TO EXERCISE DISCRETION AS TO THE FACTS, ON AN ASSUMPTION OF ADMISSIBILITY OF EVIDENCE, DIFFERENT FROM THE BASIS OF THE RULING OF THE DISTRICT JUDGE.

The ruling of the district judge that the motion failed to set forth any "legal basis" for granting a new trial was based on a ruling that the Corriston evidence was inadmissible.

This Court ruled that the evidence is inadmissible. That ruling was within the province of this Court, although we respectfully pray that it be reconsidered.

This Court exceeded its appellate province, however, in concluding that, even assuming that the evidence was admissible, a new trial should be denied in the exercise of discretion. That conclusion put this Court in the position of assessing the impact of the newly discovered evidence upon the evidence previously introduced and available, and of doing so without the district judge having exercised discretion as to the facts on the assumption that the evidence was admissible.

On a motion for a new trial, the probative weight of newly discovered facts is initially committed to the trial court's discretion. The appellate court's function is to review only for an abuse of discretion and to be guided in that function by the elements taken into account by the district judge in the exercise of his discretion. Indeed, if the district judge—on an assumption of admissibility—granted a new trial, this court would not even have occasion to consider the exercise of discretion involved, since there would be no appeal by the Government.

As already indicated, even assuming the Court continues to hold the evidence inadmissible, appellant requests that the Court adhere to its proper appellate function. The reason is that appellant desires to present the legal questions of evidence to the Supreme Court.

II. HOLDING CORRISTON'S TESTIMONY INADMISSIBLE PRECLUDES EVIDENCE THAT IS ESSENTIAL TO A JUST VERDICT. EVEN UNDER THE DOCTRINE ANNOUNCED BY THE COURT CORRISTON'S TESTIMONY IS ADMISSIBLE. AND THAT DOCTRINE IS NARROWER THAN THE AUTHORITIES INCLUDING DECISIONS OF OTHER COURTS OF APPEALS.

The Court's opinion has the effect, not only for this case but for future criminal proceedings, of shutting the eyes of judges and juries to evidence that is essential to a just verdict. Such a result should not be countenanced unless it is required by settled law. There is no such requirement in this case.

The prosecution's proof was based fundamentally upon appellant's activities in the whiskey black market. The defense is that when appellant's whiskey black market activities are taken as a whole, they negate income tax evasion. The defense rests upon the facts concerning the nature and extent of Gersh's role in their common whiskey black market activities. The Court's opinion in effect limits appellant to his own testimony, which is naturally suspect. Gersh gave opposing testimony at the first trial, in an effort to exculpate himself from receipt of black market whiskey money. Corriston's testimony would show what it was that Gersh did and said during the course of their common whiskey black market activities. As the authorities have often noted, such contemporaneous evidence is likely to be even more reliable than Gersh's subsequent testimony.

A. THE COURT FAILED TO GIVE CONSIDERATION TO APPELLANT'S CONTENTION THAT CORRISTON'S TESTIMONY WAS ADMISSIBLE TO SHOW GERSH'S VERBAL ACTS EITHER WITHOUT REGARD TO ANY TESTIMONIAL USE (TO PROVE THE TRUTH OF WHAT GERSH SAID), OR UNDER A PERMITTED HEARSAY USE RELATING TO STATEMENTS OF INTENTION.

The Court's opinion fails to give consideration to appellant's contention that Corriston's testimony is admis-

sible even if strictly limited to a showing as to what statements were made by Gersh, without regard to a testimonial use attempting to establish the truth of what Gersh said; and is, in any event, admissible under the hearsay exception relating to statements of intention. (Appellant's Opening Brief, p. 18, par. 1; p. 21, par. 3; Appellant's Closing Brief, p. 6.)

Appellant testified concerning large payments to Gersh. There was no dispute that appellant sent Gersh $47,500 by check, of which $35,000 was returned. As already noted, the jury was not advised of the large cash transfers by appellant that were established by Gersh's own bank records at the first trial.

The prosecution argued to the jury that Gersh was shown to be in the coin machine business and not the whiskey business, that indeed appellant testified that Gersh had handled such coin equipment for appellant, and that there was nothing apart from appellant's uncorroborated testimony to show that Gersh was involved in whiskey black market activities. (R. 8.)

1. Corriston's testimony is admissible, to show how active Gersh was in the whiskey black market, without in any way involving a hearsay or testimonial use of Gersh's statements.

a. Corriston testifies that Gersh solicited him on two different occasions to obtain black market whiskey.[5] He is testifying as to Gersh's words, to be sure, for solicita-

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[5] (a) Gersh first solicited Corriston in the late spring of 1943. Corriston testifies: Gersh asked me where he could get a quantity of whiskey for Wolcher, and to convince me that he was seriously interested he showed me a wad of hundred dollar bills. (R. 14.)

(b) In November or December, 1943, Gersh called me for lunch, said the previous contract had petered out, that Wolcher needed an ample supply of whiskey for the holiday season, and asked me for further ideas where he could get it. (R. 14-15.) Corriston then established a contact with Taylor as the source of supply. (R. 15.)

tions are words. Gersh's words are not used testimonially to prove the truth of the words uttered but rather to prove that Gersh actually uttered these words of solicitation.

b. As the middleman between Gersh and Taylor, the man supplying the whiskey, Corriston testifies that in the negotiation to set up a further meeting he advised Gersh that it was necessary to assure Taylor that Gersh was good for $50,000 in cash, with a $10,000 advance deposit. (R. 15.)

c. Corriston testifies that at the resulting meeting Gersh paid Taylor a $10,000 deposit. (R. 15-16.)

d. Corriston testifies that at the resulting meeting Gersh gave assurances to Taylor of $50,000 cash on hand and entered into an agreement to pay Taylor the additional $40,000. (R. 16.)

The foregoing is not the use of hearsay. The purpose is to prove that Gersh actually did these acts and make these statements, for these statements are themselves "verbal acts" of solicitations, negotiations, assurances, and agreements relating to the common venture of Gersh and Wolcher in the purchase of black market whiskey. Corriston's testimony is admissible without regard to the truth or falsity of Gersh's statements for the mere fact that he made these statements and did these acts is proof of Gersh's black market activities which is unquestionably relevant and material.

2. Insofar as these statements by Gersh are considered to involve a possible testimonial use, it is permissible under the hearsay exception relating to statements of present intention—Gersh's intention to buy and pay cash for substantial volumes of black market whiskey. Indeed, under that exception Corriston's testimony that at the restaurant meeting with Taylor, Gersh stated his readiness to pay an additional $40,000 cash upon shipment, is admissible to show not only Gersh's expressed intent at the time but

also, as a matter of circumstantial evidence, that Gersh later paid that money in accordance with his expressed intent. See *Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285 (1892).

Gersh's readiness in November or December 1943 to pay $40,000 cash, in addition to a $10,000 cash deposit, for black market whiskey is particularly corroborative of appellant's defense in view of appellant's testimony that he delivered $60,000 to Gersh early in November, 1943 (R. 14109, pp. 360-1), whereas Gersh testified he had only handled $30,000 at that time and merely for the purpose of cashing a check for appellant. (See fn. 4, p. 8, *supra.*)

B. IN ADDITION, TESTIMONIAL USE OF GERSH'S STATEMENTS TO ILLUSTRATE THE CHARACTER OF HIS BLACK MARKET ACTIVITIES AS MADE FOR APPELLANT'S BENEFIT IS PERMISSIBLE UNDER THE DOCTRINE APPLIED IN OTHER COURT OF APPEALS DECISIONS TREATING RES GESTAE DECLARATIONS AS AN EXCEPTION TO THE HEARSAY RULE.

By far the major part of Corriston's testimony is admissible under the foregoing rules. The only declarations of Gersh which may possibly involve a hearsay use not covered by those rules are those in which Gersh states that he was acquiring the whiskey for appellant. The authorities make clear, however, that Corriston's testimony is not thereby rendered inadmissible.

Appellant's opening brief cites the three cases referred to in footnote 2 of the Court's opinion. Appellant's closing brief, in responding to the Government's brief, cites other decisions to which the Court does not refer, particularly *Chicago M. & St. P. Ry. Co.* v. *Chamberlain,* 253 Fed. 429 (9th Cir.), and *Aetna Ins. Co.* v. *Licking Valley Milling Co.,* 19 F. 2d 177 (6th Cir. 1927), which rely on the res gestae doctrine as set forth in Wharton on Evidence. Under this doctrine, extra judicial declarations which are contemporaneous with or grow out of acts in issue, serve to illustrate their character, and are so nearly

connected with them as to form part of the transaction, are admissible in evidence.

After pointing out that Gersh's res gestae declarations are admissible without any testimonial use dependent on establishing the truth of what Gersh said, appellant stated (closing brief, p. 7):

> "Second, although res gestae declarations are not admissible merely because of their testimonial use, if they are admissible as the incidents of an act or transaction in issue—here the black market activity—they may be used testimonially insofar as they describe the nature or character of the incidents—black market purchases for the benefit of Wolcher. This is plain from the *Chamberlain* and *Aetna* cases cited above, and from *Insurance Co.* v. *Mosley,* 8 Wall. 397 (1869), and the other cases cited in appellant's opening brief.

In the *Aetna* case, the issue was whether an insurance policy had become effective. Plaintiff agreed to place insurance on its mill with one Bennett, an insurance agent, who did not have an agency for the Aetna company. Plaintiff's manager testified in his presence that Bennett, who represented plaintiff, telephoned someone, identified to him by Bennett as Aetna's agent Stone, and that "after the conversation over the 'phone, he [Bennett] told me the insurance was in effect." This testimony was admitted over defendant's objection, and on appeal the court held, on the authority of the *Chamberlain* case among others, that

> "the statement was admissible as part of the res gestae, for we interpret the manager's testimony as a whole as meaning that Bennett's statement was made at the close of the telephone conversation." (19 F. 2d at 179.)

The court cited its earlier opinion in *Tuckerman* v. *United States,* 291 F. 958 (6th Cir. 1923), cert. denied, 263 U.S. 716, a prosecution for bribery. There the declaration of a husband to wife following receipt of a

bribe from defendant, to the effect that defendant had given him the money, was held admissible. That declaration, the court said, was a "contemporaneous statement directly relevant to the primary fact of [defendant's] payment of money, a fact not only natural, but important to be stated to [the wife], who was to give clearances." 291 F. at 970.

In *Aetna* the court held, citing *Tuckerman,* that Bennett's declaration was admissible even though the declaration did not occur on an exciting occasion and declarant was not a party to the case. The court continued (19 F. 2d at 180):

> "The above comment on the Tuckerman case is substantially applicable to Chicago, M & St. P. Ry. Co. v. Chamberlain (C.C.A. 9) 253 F. 429, 430 (where the statement in question was made by plaintiff before the accident, and in the absence of shock, stress, or excitement, and was described by the court as being 'in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself'; St. Clair v. United States, 154 U.S. 134, 149, 14 S. Ct. 1002, 38 L. Ed. 936, where the court cites with approval the definition of res gestae found in 1 Wharton on Evidence (2d Ed.) § 259, 1879.[3]"

"[3] The 'res gestae may be, therefore defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of a litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate casual [causal] relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.' This definition is in substance the opening paragraph of the definition of res gestae in Words and Phrases."

Gersh's statements both (1) are illustrative of the character of his black market purchases,—as made in appellant's behalf and not for his own account, and (2) are causally related to the black market purchases, since they were made first as part of Gersh's efforts to induce Corriston to act as middleman, and second to assure Corriston that he, Gersh, had the necessary cash to consummate the purchases.

This Court should recognize, as Professor Morgan suggests, that the

> "rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception." (Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 Harv. L.R. 177, 218 (1948).)

Gersh's statements to Corriston in the course of his black market activities are equally if not more reliable than Gersh's present testimony. They were not self-serving when made. By their very nature they did not reflect a "wariness seeking to manufacture evidence for itself." Both on authority and sound policy, Corriston's testimony as to what Gersh said and did in the course of black market activities is admissible.

C. GERSH'S STATEMENTS TO A MIDDLEMAN (CORRISTON) MADE DURING THEIR PARTICIPATION IN THE BLACK MARKET ACTIVITIES ARE ADMISSIBLE AS PART OF THE RES GESTAE OF THE BLACK MARKET CONSPIRACY WHETHER OFFERED FOR OR AGAINST A CO-CONSPIRATOR.

The Court's opinion holds that Gersh's statements are not admissible as declarations of a co-conspirator, since such declarations are admissible solely as vicarious admissions. That is one basis, but it is not the only basis for admitting the declarations of a co-conspirator.

The precise question in this case is one of first impression in the Federal courts, and is not governed by settled

Federal decisions. However, there is Federal precedent to establish that statements of a co-conspirator made during and as part of the course of the conspiracy, and relating to its object, are admissible as part of the res gestae of the conspiracy. And there is general authority for the view that statements that are part of the res gestae of the conspiracy are admissible in favor of as well as against a co-conspirator.

The question is therefore an open one,—and not foreclosed as Wigmore would imply. The Court is accordingly respectfully requested to reconsider its position in the light of these decision precedents.

There are clear statements that declarations of a co-conspirator are admissible as constituting part of the res gestae of a conspiracy if the declarations relate to the object of a conspiracy and are made while the conspiracy is in progress. See *American Fur Co.* v. *United States,* 2 Pet. 358, 364-5 (1829); and other cases analyzed in *Jones* v. *United States,* 179 Fed. 584 (9th Cir. 1910).

Although the precise question has not arisen in the Federal courts, there is other authority that declarations of a co-conspirator that are part of the res gestae of a conspiracy are admissible in favor of as well as against the other co-conspirators.

The rule is noted as follows in 22 C.J.S., Criminal Law, sec. 777, and also 16 Corpus Juris, Criminal Law, pp. 668-9, cited at p. 8 of appellant's closing brief:

> "Sec. 777. Where several persons participate in the actual commission of a crime, the acts and declarations of any one of them, while so participating, are admissible against all the others. (72) It is sometimes intimated that such evidence is received under the rule with respect to the acts or declarations of co-conspirators and codefendants, but as such evidence is frequently received when the circumstances are such that the limitations of the rule mentioned would pre-

> clude its reception, it is apparent that the real reason for the admission of the evidence is that such acts or declarations constitute a part of the res gestae (73), a view which is confirmed by the fact that such evidence is admitted in favor of the accused person on trial (74). Such evidence is admissible even when the indictment does not charge conspiracy (75). So also a declaration which is not of itself in furtherance of the common design may be admitted where it constitutes a part of the res gestae of acts done in furtherance thereof (76). Likewise declarations of one conspirator in favor of a fellow conspirator are admissible when a part of the res gestae (77). However, it is essential that such acts or declarations be a part of the transaction in question (78).

The underlying cases include several cases cited in appellant's closing brief (pp. 7-8) where the court specifically overruled the contention that declarations of one co-conspirator could not be evidence in favor of another. *Rex* v. *Whitehead,* 171 Eng. Rep. 1105 (1824); *Meador* v. *State,* 72 Tex. Cr. 527, 162 S.W. 1155 (1914); and *Zellerbach* v. *Allenberg,* 99 Cal. 57, 33 Pac. 786 (1893).

Appellant's closing brief (p. 8) further pointed out:

> "that declarations of an agent made in connection with a transaction are admissible in evidence as part of the res gestae, even though offered in favor of the principal. 32 C.J.S., Evidence, sec. 410; *Aetna Ins. Co.* v. *Licking Valley Milling Co.,* 19 F. 2d 177 (6th Cir. 1927); *American Ins. Co.* v. *Lowry,* 62 F. 2d 209 (5th Cir. 1932). Men who enter into concert for an unlawful end 'become *ad hoc* agents for one another and have made a partnership in crime.' *United States* v. *Pugliese,* 153 F. 2d 497, 500 (2d Cir. 1945); see *Cosgrove* v. *United States,* 224 F. 2d 146 (9th Cir. 1955)."

The proposition is set forth in 32 C.J.S., Evidence, sec. 410, p. 28, as follows:

> ". . . declarations of an agent made at the time of a particular occurrence or transaction, or near enough

> thereto to form a part thereof, which tend to explain or illustrate it, made while the agent is acting within the scope of his authority, may be given in evidence as part of the res gestae, either *for* or against the principal or employer." (Emphasis supplied.)

The *Aetna Ins.* case is discussed above in this brief (pp. 19-20), and plainly establishes that a plaintiff may offer in evidence an extrajudicial declaration made to plaintiff by his agent at the time of a transaction, under circumstances without stress and excitement, as part of the res gestae.

As noted in appellant's closing brief (p. 10) the decision in *Nothaf* v. *State,* 91 Tex. Cr. 378, 239 S.W. 215, is entirely distinguishable since there the court rejected statements of an accomplice in jail. Those statements were thus made after the arrest had terminated the conspiracy.

In view of the authorities cited above, which the court has not discussed, it is plain that there is no settled rule of law prohibiting the admission of statements between co-conspirators during the working out of the conspiracy. Such precedents as consider the point have admitted the mutual declarations of co-conspirators, made during the conspiracy and relating to its objects, as part of the res gestae, in favor of as well as against a conspirator. The Federal courts should not adopt a more restrictive view, particularly where, as here, Gersh's statements to a middleman who was himself part of the conspiracy were not self-serving or in any way part exculpatory when made. Where declarations are mere naked statements, it might be sound to limit the basis of admissibility to the doctrine of vicarious admissions. But since these declarations were contemporaneous with and integrally and causally related to the conduct of the conspirators, reason, fairness, and justice indicate that they should be admitted as part of the res gestae of the conspiracy.

PRAYER

For the foregoing reasons it is respectfully prayed that this Court set the cause down for reconsideration and rehearing.

In the event that the Court refuses that prayer, it is prayed that the Court modify its opinion to strike the last four paragraphs.

In the event the Court fails to set the cause down for reconsideration and rehearing, whether or not it modifies its opinion, the appellant prays that this Court stay its mandate pending filing by appellant of a petition for certiorari in the Supreme Court of the United States and pending disposition by the Supreme Court.

Respectfully submitted,

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June 14, 1956

Harold Leventhal

Certificate

I hereby certify that the foregoing petition for rehearing is well founded and is not inserted for purposes of delay.

Harold Leventhal

HAROLD LEVENTHAL.

June 14, 1956